IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1137 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE H.L.GOKHALE

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VEETRAG HOLDING PRIVATE LIMITED

Versus

MAHALAXMI HOUSING AND FINSTOCKPRIVATE LIMITED

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1. Whether Reporters of Local Papers may be allowed to see the judgment ?

2. To be referred to the Reporter or not ?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

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Appearance:

MR B.R. SHAH with MR BM MANGUKIYA for Petitioner

MR SURESH M SHAH for Respondent No. 1

MR B R GUPTA for respondent no.2

CORAM : MR.JUSTICE H.L.GOKHALE

Date of decision: 08/08/96

ORAL JUDGEMENT

Heard Mr B.R. Shah with Mr B.M. Mangukiya for the petitioner, Mr S.M. Shah for respondent no.1 and Mr B.R. Gupta for respondent no.2

2 The petitioner herein had applied for joining as a party-respondent under Order 1 Rule 10(2) of the Code of Civil Procedure in Civil Suit No.6587 of 1991 filed by respondent no.1 against respondent no.2 and which is pending in the City Civil Court at Ahmedabad. That application came to be rejected by the learned Judge of Court No.20 by her order dated 19th July 1996. Being aggrieved by that order, the present revision application has been filed.

3 Respondent no.2 is a company registered under the provisions of the Companies Act and owns certain lands which are vested in it. In view of various financial difficulties faced by it, the Corporation decided to sell some of those lands. An agreement to sell was entered into with respondent no.1 on 6th April 1990. Respondent no.1 paid the earnest money payable under that agreement but thereafter there were certain difficulties in the matter of implementation of the agreement and respondent no.2 terminated the agreement. Respondent no.1 therefore filed a suit for specific performance and in the alternative for damages. In that suit respondent no.2 pointed out that the agreement contained a provision for arbitration and on 31st January 1994 the controversy came to be referred for arbitration. In the meanwhile respondent no.2 had again invited tenders for sale of this very land and an agreement was entered with the petitioner on 28.9.1992. The petitioner also paid the earnest money as required to be paid but again there were certain difficulties in compliance of subsequent clauses and that agreement also came to be terminated on 6.12.1993. The petitioner also sought an arbitration amongst other reliefs by filing a suit under section 20 of the Arbitration Act. That arbitration was granted by the City Civil Court but on the respondent no.2 filing a revision application in this Court being Civil Revision Application No.228 of 1995, the said order came to be stayed on 14.2.1995. In the aforesaid proceedings under section 20 of the Arbitration Act, the petitioner filed an application for injunction restraining the respondent no.2 from dealing with the property pending the suit. That application came to be rejected and Appeal from Order No.144 of 1994 came to be filed against the same. The said appeal was rejected by my brother S.D. Shah, J.

by a detailed judgment dated 11.7.1994. A Special Leave Petition was filed but, the same has been rejected by the Hon'ble Supreme Court of India.

4 As stated hereinabove, respondent no.1 got the arbitration proceeding initiated in January 1994 against respondent no.2. In those proceedings, the arbitrators differed and the controversy came to be referred to an umpire who is a former judge of this Court, namely, Hon'ble Mr T.U. Mehta, J. In the view of respondent no.2 the arbitration proceeding had extended beyond the time within which the proceeding were expected to be completed, and the arbitrators had become functus officio and the umpire had no authority to enter into the proceedings. Respondent no.2 therefore did not participate before the umpire. The umpire gave his award on 5.2.1996 and it came to be filed in the City Civil Court on 30th April 1996. Respondent no.2 informed the petitioner by their letter dated 22nd May 1996 that the award had been so filed. Thereafter the respondent no.1 filed an application seeking certain modification in the award and respondent no.2 has oppossed the same by filing a reply. After the said award was so filed, the petitioner filed an application in the said Court seeking to join in the said proceedings. The same has come to be rejected by the order dated 19th July 1996 hence, this revision.

5 The petitioner contended before the trial Court that the petitioner was at least a proper party, if not a necessary party under the provisions of Order 1 Rule 10(2) and their presence was necessary to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit. This submission was opposed on behalf of respondent no.1 by submitting that the arbitration proceedings were between respondents nos.1 and 2 only and the petitioner had no business to enter into the proceedings pending between two of them in the City Civil Court in any manner whatsoever. The petitioner submitted before the learned trial Judge that issues framed by the arbitrators indicated that the petitioner very much had an interest in the matter and that was reflected therein. Issues nos.7 and 8 framed by the learned arbitrators were as follows:

"(7) Whether GSTC proves that it had entered into a fresh agreement for sale at the disputed land, and if so, what is the effect?

(8) Whether GSTC proves that on account of change in

equities and change of circumstances as stated by the GSTC the agreement had become impossible of performance?"

One of the learned arbitrators, Mr R.C. Mankad, J. did not find it necessary to answer issues nos.7 and 8 while declining the specific performance as sought by respondent no.1. The other learned arbitrator, Mr N.H. Bhatt, J. who held in favour of the specific performance observed on these two issues as follows:

"GSTC has taken up a clear contention that after termination of the contrat they had entered into a fresh agreement with a third party and the equity had changed. There is little merit in this contention. Moreover, it is for the third party to agitate this question. It is not open for the plaintiff to refuse to perform their obligations."

The umpire Mr T.U. Mehta, J. held as follows on these two issues in paragraph 11 of his award :

"11. The opponent - GSTC has contended that it has entered into some fresh agreement of sale and, therefore, the equities in the case have changed. These contentions form the subject matter on issues nos.7 and 8. I see no substance in these contentions because there is no proof of any fresh agreement after termination."

6 It was therefore submitted before the learned trial Judge that the above statements indicated that the petitioner was very much in picture in arbitration. It was further submitted that those issues have come to be decided ignoring the interest of the petitioner and therefore the petitioner ought to be allowed to agitate its cause in the pending suit filed by respondent no.1 herein. Needless to state that the main grievance of the petitioner was that if the award obtained by respondent no.1 is made rule of the Court, the suit which is filed by the petitioner for seeking specific performance of their contract would become infructuous to the extent of the relief of the specific performance is concerned.

7 The learned Trial Judge has dealt with all these submissions apart from the authorities cited by both the parties. On behalf of respondent no.1 it was principally submitted amongst others that (i) the applicant had slept over their right for nearly two years after they became

aware of the pendency of the suit between respondent no.1 and 2 herein and (ii) apart from the aspect of delay, under Order 1 Rule 10(2), the petitioner had no locus in the pending suit inasmuch as respondent no.1 could not be compelled to sue against third party against whom no relief had been prayed in their suit. The learned Trial Judge accepted these submissions and rejected the application.

8 Mr B.R. Shah, learned counsel appearing for the petitioner, submitted that as stated above, the above referred issues no.7 and 8 framed by the arbitrators indicated that the petitioner very much had an interest in the pending suit between respondents nos.1 and 2. With respect to the first objection of the respondent no.1, Mr B.R. Shah submitted that the petitoner had moved at the earliest possible. However, on this aspect, it cannot be denied that at the latest by 11.7.1994 (the day on which the Appeal from Order No.144 of 1994 came to be rejected by this Court) the petitioner had come to know about the pending suit between respondents nos.1 and 2 which is reflected in the judgment and order of Mr S.D. Shah, J. This can be seen from paragraph 28 of the judgment of Shah, J. wherein it is recorded as follows:

"28. At this stage when the Court is to conclude its judgment and order, an additional affidavit was filed by the appellant plaintiff before this Court whereby it was contended that by letter dated 27th November, 1993, appellant plaintiff inter alia enquired about the pendency of the suit against respondent defendant Corporation in the City Civil Court which is filed by Mahalaxmi Housing and Finstock Pvt. Ltd. in relation to the suit property. It was submitted before the court that when reference to this fact was made in the course of oral submission, counsel for the respondent corporation stated to the court that no such proceeding is pending. However, on further enquiry, it is revealed that Regular Civil Suit being Suit No.6857 of 1991 which is filed by M/s Mahalaxmi Housing and Finstock Pvt. Ltd. against respondent defendant corporation on 6.12.1991 for specific performance of agreement of sale is pending. It is further stated in the affidavit that in such suit also an application for temporary injunction filed which was opposed by the respondent-Corporation on the ground that there is a valid and subsisting Arbitration Agreement. In such suit the respondent defendant corporation has applied for stay of the

proceedings under section 34 of the Arbitration Act, 1940, and that the suit is stayed."

9 The present application has been filed in the City Civil Court as late as 20th June 1996. Nothing prevented the petitioner from moving earlier and to apply for joining into this suit. At that time the arbitration proceedings were also pending and were not disposed of. The petitioner did not care to intervene at a stage when it ought to have intervened if it wanted to interfere. The order to be passed under Order 1 Rule 10(2) is a discretionary order and for seeking that discretionary relief it is necessary for the party concerned to move expeditiously, as held by the Supreme Court in the matter of grant of discretionary reliefs in the case of State of Maharashtra v. Digambar reported in (1995) 4 SCC 683. The conduct of the party approaching the Court for discretionary relief is very relevant. In para 20 of the said judgment the Honourable Supreme Court has held as follows:

"Laches or undue delay, the blameworthy conduct of a person in approaching a court of equity in England for obtaining discretionary relief which disentitled him for grant of such relief was explained succinctly by Sir Barnes Peacock, long ago, in Lindsay Petroleum Co. v. Hurd thus:

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation, in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which outherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute or limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the once course or the other, so far as it relates to the remedy."

In the instant case therefore it cannot be disputed, (assuming that the petitioner has any right to intervene in the present proceedings) that the petitioner has approached the trial Court too late in the day.

10 With respect to the second objection of respondent no.1, it cannot be ignored that the suit pending in the City Civil Court is between respondent no.1 and 2. It is respondent no.1 who has sought the arbitration and that award has been given. Respondent no.1 is seeking the same to be made the Rule of the Court. The entire submission of Mr B.R. Shah on this point is based on issues nos.7 and 8 framed by the arbitrators and the observations of the learned trial Judge in para 9 of the order where she has observed that the legality of the findings and the binding effect of the umpire's decision would be examined, if necessary, at the time of ultimately passing the decree in the suit. Mr B.R. Shah submits that there is hardly any such occasion now available. In view of the observation of the umpire, Mr T.U. Mehta, J., in paragraph 11 of his award, namely, that there is no substance in the contentions raised in issues nos.7 and 8, because there is no proof of any fresh agreement after termination. Mr B.R. Shah alleged collusion on the part of Respondent no.1 with Respondent no.2 and that the petitioner has suffered in that.

11 In view of this allegation, Mr P.D. Dave, Officer on Special Duty, of Respondent no.2, has filed a reply and has affirmed that a copy of the agreement between the petitioner and respondents no.2 dated 28.9.1992 was placed before the arbitrators along with the list of documents filed on 10.1.1992. Along with this reply a xerox copy of the list of the documents filed on that date (wherein this agreement is referred to at serial no.1) was enclosed. It is further stated in this affidavit that this agreement was filed before the Joint Arbitrators and their award with all their papers and documents was subsequently forwarded to the umpire. It is submitted by Mr Gupta that the aforesaid statement of Umpire T.U. Mehta, J. is erroneous. Mr Gupta stated that this error could have been committed by the umpire for the reason that respondent no.2 had abstained from appearing before the learned umpire and the respondent no.1 had no interest in showing that agreement. In my view, not much advantage can be taken from this solitary statement appearing in paragraph 11 of umpire's award which is pressed into service to contend that respondent

no.2 failed to place the full material including the agreement on record and that the petitioner suffered thereby in the determination of issues nos.7 and 8. Mr Shah amongst others submitted that this conduct on the part of the respondent no.2 was a fraudulent one. He submitted that they were trying to side with respondent no.1. Inasmuch as fraud vitiates every thing if there is any delay in making the application to the trial court that ought to be ignored. Mr Shah relied upon the observations of the Supreme Court in the case of S.P.C. Naidu vs. Jagannath reported in AIR 1994 SC 853. However, as stated above, prima facie, the observations of the learned umpire appear to have arisen because of the aforesaid absence of respondent no.2 before the umpire. It cannot amount to any fraud on the part of respondent no.2. In any event, as stated earlier, nothing prevented the petitioner from moving earlier when way back they knew about the pending suit. Mr Shah further submitted that this is a kind of denial of principles of natural justice and he tried to make his submission good relying upon the judgment of the Division Bench of this Court reported in 1970 GLR 457. Mr Shah submitted that the determination on the two issues by the umpire amounted to a decision behind the back of the petitioners. In my view, the aforesaid two issues were only incidental to the main issues. The main issues were decided by the umpire in favour of respondent no.1. The determination on the earlier issues was sufficient for the purposes of decision on the contract. The matter which was pending before the umpire and for that the matter before the arbitrators was between respondents nos.1 and 2. While deciding that matter if there are any observations otherwise they cannot be considered as causing any prejudice to any third party. Therefore, in my view, the submission on denial of principles of natural justice is misplaced. As held by the Honourable Supreme Court in the case of N. Chellappan vs. Secretary Kerala State Electricity board reported in 1975 (1) SCC 287 the umpire as sole arbitrator is not bound to give a reasoned award and if in passing the award he makes a mistake of law or of fact, that is no ground for challenging the validity of the award available to the parties to the arbitration as well.

12 Mr B.R. Shah then relied upon the judgment of the Supreme Court reported in AIR 1958 SC 886 to highlight the circumstances wherein a third party was allowed to join under Order 1 Rule 10(2). He also relied upon the observations of the Supreme Court in a recent judgment reported in 1992(2) JT 116. These judgments

undoubtedly laid down the guidelines which the Courts have to bear in mind but, in a suit which is pending between two parties concerning an award between them a third party which has slept over its rights for more than 2 years cannot be permitted to join. In my view, it cannot be said that the petitioner was a party necessary in the pending suit to effectively decide the issues which respondent no.1 had raised against respondent no.2.

13 As against that, Mr S.M. Shah, learned counsel appearing for respondent no.1 relied upon the judgment of a Single Judge of this Court in the case of Rasiklal Shankerlal Soni v. Natverlal Shankerlal Upadhyaya reported in 1975 GLR 533 wherein concerning a suit for specific performance under Order 1 Rule 10(2), a single Judge of this Court has observed as follows:

> "Under sub-rule (2) of rule 10 of Order 1 of the Civil Procedure Code, a person may be added as a party to the suit in two cases only, namely (1) when he ought to have been joined and is not joined, that is, whenever he is a necessary party; and (2) when without his presence the suit cannot be completely adjudicated. There is no jurisdiction to add a party in any other case merely because that would save a third person the expense and botheration of a separate suit for seeking adjudication of a collateral matter, which was not directly and substantively in isssue in the suit into which he seeks inclusion. The question whether a person should be added as a party to the suit or not depends on the nature of the suit and the allegations made in the pleadings. The necessary party in suit for specific performance of contract for sale are parties to the contract or if they are dead their legal representatives as also a person who purchased the property from a vendor after the contract."

In my view, these observations are apt and are very much applicable to a controversy of the present nature.

14 In view of the aforesaid discussion, I find no error in the order passed by the learned trial Judge where she has held rightly that the plaintiff could not be compelled to sue against a third party against whom no relief has been prayed for in the suit. The CRA is therefore rejected.

15 Although this revision is being rejected, with a view to understand the criticism on the conduct of respondent no.2 (which is a public corporation) I had asked Mr Gupta, the learned advocate appearing for respondent no.2 to file an affidavit. As stated earlier, Shri P.D. Dave, Officer on Special Duty, has filed an affidavit. He has placed it on the record the stand taken by respondent no.2 with respect to proceedings between the rival parties. After perusing the affidavit, it cannot be said that respondent no.2 was in any way siding with any of the two parties. They are interested in getting the price of their land and in spite of having a clear title they have not been able to realise the amount which they have to pay to their employees and to meet with various obligations. It has been stated in the affidavit that respondent no.2 did contest the arbitration before the joint arbitrators, did file the necessary documents and opposed the functioning of the umpire. Subsequently when the award was filed in the Civil Court, respondent no.2 also opposed any modification outside the agreement which was entered into between respondents nos.2 and 1. On inquiries from the learned counsels it is learnt that the amount of interest along with the principal amount as per the agreement will as of now fetch an amount of about Rs.14 crores to the respondent no.2-dCorporation. The Corporation is not much happy about the award, however, in these circumstances of delay and hardships, the Corporation has decided to accept the award while insisting however that there should be no departure from the terms in the original agreement. This was necessary particularly in view of clause 14(c) in the umpire's award which indicated a departure from the original agreement. Mr S.M. Shah, the learned counsel for the respondent no.1 after taking instructions, has accepted this submission of Mr Gupta. Mr S.M. Shah has further stated that within one month from the award becoming the rule of the Court, the entire amount under the agreement will be paid to respondent no.2 unless of course there is any injunction against respondent no.1 in that behalf. He has also placed on record an affidavit of one Mr Bholabhai Patel, Director of respondent no.1, affirmed on 7.8.1996 which states as follows:

" I, Bholabhai Patel, the director of the respondent no.1 company declare on oath as under.

1. That I will seek decree pursuant to the award subject to all terms and conditions of the suit agreement dated 6.4.1990.

2. That on decree passed by the lower court, I will make payment within 1 month of the decree that will be passed by the trial court if no further orders of restrain or stay passed by any court and in the event of plaintiff respondent no.1 not voluntarily paying and no order of stay or injunction are issued in the matter, the plaintiff respondent no.1 agrees that its decretal right can be considered cancelled."

16 Mr B.R. Shah, learned counsel appearing for respondent no.1, has stated that the present price of the land would be more than thrice of what is now being paid by respondent no.1. I therefore asked Mr Gupta that in the event respondent no.1 fails to make the payment, whether respondent no.2 will be agreeable to settle the matter with the petitioner in their suit (instead of inviting fresh tenders) at the price which is presently prevalent in the market. On Mr Gupta indicating an inclination, I had asked Mr Shah to place it on record as to whether the petitioners are ready and willing to take the land within a specified time in case of such an eventuality at three times of the price now being paid by the respondent no.1. After seeking some time and seeking instrustions, Mr B.R. Shah has declined to make any such statement.

17 Mr B.R. Shah and Mr Mangukia apply for stay of this order. Mr S.M. Shah and Mr B.R. Gupta oppose this prayer and pointed out that no stay was sought nor granted by the trial Court against the operation of its order which is impugned herein. The application of stay is therefore rejected.

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